

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA  
AT MUSOMA**

**CRIMINAL SESSIONS CASE No. 25 OF 2021**

**THE REPUBLIC  
*Versus*  
KIUMBE HARUNA @ ATHUMANI**

**JUDGMENT**

19.07.2022 & 20.07.2022

Mtulya, J.:

The community of thirty five (35) persons in Bukabwa Village of Butiama District in Mara Region had formed an association to assist each other in economic and social welfare activities by assisting one another by way of contributions in their basket fund (the fund). The fund with a bunch of monies was given to one of the members of the association in the mid and end of every month, specifically on the cycle of 14<sup>th</sup> day and 28<sup>th</sup> day of every month. In every meeting, the gathering was associated with happiness and pleasure of food and drinks. The members named their association as **Wanamzambara Pamoja Tunaweza Group** (the association).

Mr. Kiumbe Haruna @ Athumani (the accused person) was appointed as treasurer of the association as the community had confidence and trust on him and did justice to the post for thirty one (31) cycles without any problems, quarrels or any dispute

between the members in collecting both contributions and fines of the association. The contributions of the members in the fund, which joined the parties together as a community, had not produced any problems. However, the fines totaling Tanzanian Shillings Fifty Thousand (50,000/=) Only emanated from minor offences, like misconduct, noise making and late coming to the association meetings had caused expiry of one of the association members in the thirty second (32<sup>nd</sup>) cycle of the meetings which was held at the accused person's home residence on 29<sup>th</sup> October 2020. This day, was the turn of the cycle to the accused person, but Mr. Raphael George @ Ochira (the deceaseds person), Secretary to the association was killed by the accused person to invite horror in both the association and Bukabwa community.

Following the killing incident, the charge against the accused person was drafted which shows that on 29<sup>th</sup> day of October 2020, at Bukabwa Village within Butiama District in Mara Region, the accused person killed the deceased person with malice aforethought, murder. When the accused person was summoned for plea taking and preliminary hearing in this court on 11<sup>th</sup> November and during the hearing on 19<sup>th</sup> July 2022, he admitted the offence of killing without malice aforethought, manslaughter. However, his plea of manslaughter was rejected by the Republic

contending that the accused person had killed with malice aforethought and heavily relied on the precedent of the Court of Appeal (the Court) in **Semburi Mussa v. Republic**, Criminal Appeal No. 236 of 2020, where the Court expounded factors to be considered when searching for malice aforethought. According to page 16 of the decision a total of seven factors were listed down, namely; the type of weapon used; the amount of force used; the part where the blow was directed; the number of blows; the kind of injuries; utterances before, during and after the attack; and the conduct of the accused person.

According to Mr. Frank Nchanila, learned State Attorney, who appeared for the Republic, in the present case: the accused person used knife in attacking the deceased person; he used excessive force to cause penetration of wounds up to the lungs; he attacked at the shoulder; stabbed three times in the shoulder; inflicted high level injuries; and did not utter any words, but his conduct is questionable from the start of the incident to the end as he took knife and after the attacks, he escaped the scene of the crime.

The thinking of Mr. Nchanila was protested by Mr. Amos Wilson, learned counsel for the defence who contended that facts of the case show that there was a fight in self defence emanated

from disputes over fines of the association. According to Mr. Wilson, the members of the association asked the accused person to pay back fines as a treasurer, but the accused person declined hence the members took law into their own hands by grabbing properties of the accused person which sparked the fight and in self defence, hence the accused person stabbed the deceased person once on the shoulder.

In his opinion, Mr. Wilson, thinks that the prosecution has failed to prove an important element of murder, malice aforethought, because: first, Mr. Selemani Magesa Marwa (PW1), testified that, the deceased person touched the accused person on legs to cause anger to the accused person; second, Mr. Stephano Rugera @ Kitara (PW2) cannot be relied as he admitted in this court during the hearing of the case that he did not see some of the events during the killing incident; third, Mr. Robert Wambura (PW3) was not present at the scene of the crime during the incident of killing; and finally, Dr. Samwel Muna (PW4) brought in this court postmortem examination report of the deceased person admitted as PE.1, but produced contradictions in his statement recorded at the police and that exhibit PE.1. Mr. Wilson submitted further that exhibit PE.1 is silent on a number of wounds inflicted

to the deceased person and extent of injuries in standard measurements.

I have perused the record of the present case specifically the evidenced of PW1, PW2, PW4 and exhibit P.E.1. The evidence of PW1 shows that he was present at the scene of the crime on 29<sup>th</sup> October 2020 at the accused person's home residence for the association meeting and witnessed the accused person attacking the deceased person by knife three (3) times at his shoulder after request to pay the association's fines. According to PW1, the Chairman of the association and meeting, PW2, had requested the accused person four (4) times to pay the amount of fines collected by the accused person, but the accused person declined to pay hence in the fifth time, when the deceased person asked him, he went inside his house and returned with a knife and stabbed the deceased in the shoulder three (3) times. It is from the attacks, PW1 decided to hold the accused person's hands, but later he released him as he was attacked by accused person's grandmother at the back with firewood.

PW2 on his part he testified that the accused person attacked the deceased because he was asked by the deceased person that: *tunaomba pesa yetu. Unamaanisha usikii*, which was the fifth call in

asking the accused person to return the fines in the fund. However, according to PW2, the accused person went inside his room and returned with a knife and started attacking the deceased person three (3) times in the shoulder. PW2 testified further that the accused person was already arrested in the hands of PW1, but was rescued by his grandmother who attacked him with firewood at the back.

PW3 on his part did not produce any materials on nexus of the killing of the deceased person and the accused person, but on the arrest of the accused person, whereas PW4 produced exhibit P.E. 1 which shows that: first, at paragraph (8) *Pneumohemothorax*, second at paragraph (9) *multiple stubs wound injuries R+ superior internal chest*. There is deep stubs wound through the tissue, ribs, to the R+ lateral upper lobe that opens to the outside; and finally paragraph (10) which shows *supine lie dead body, cloth soaked with blood, multiple stubs wounds R+ superior lateral chest, no injuries per other parts of the body*.

During the case hearing, Mr. Wilson complained that the evidence of PW1 contradicts with his earlier recorded statement at Butiama Police Station on 30<sup>th</sup> October 2020 and admitted in the case as exhibit D.1. According to Mr. Wilson the witness cannot be

trusted in D.1 did not say on three (3) stabs of knife landed to the deceased person from the accused person and touching of the deceased person on legs of the accused person. With PW4, Mr. Wilson also stated that he should not be trusted as in police statement he stated that: *majeraha ya kitu chenye ncha kali sehemu ya juu pembeni upande wa kulia kifua* and repeated the same in P.E. 1 by mentioning chest, but during his testimony in this court he mentioned shoulder. Similarly, Mr. Wilson complained on the words multiple injuries and extend of depth of wounds in PE.1. According to him, during testimony PW4 stated on three (3) attacks and deep wound to the lungs, but in PE.1 he was silent, and similarly, PW4 was silent on specific depth of the wounds in exhibit PE.1.

I have also scanned the defence evidence. Mr. Kiumbe Haruna @ Athumani (DW1) testified that the association grabbed his properties in lieu of the fines and had to defend his properties from grab and was attacked by the deceased person. This situation, according to DW1, had caused provocation in him. According to DW1, the attacks and fights occurred inside his house to defend his possessions, including a bed and mattress sized 3 X 4 feet. DW1 testified further that he was attacked by fire woods, *mateke* and

*ngumi* from the association members and was rescued by his grandmother called Nyakurwa Athumani.

Nyakurwa Athumani (DW2) was summoned to testify, on his part, he stated that on 29<sup>th</sup> October 2020, when she was inside her house, she heard noises in DW1 residence and went for the noises. However, according to DW2, at the scene of the crime she found DW1 attacked by his fellow members of the association and some items were dragged outside DW1's house, such as bed, mattress, stools, tables, chairs and other items. According to DW2, he had to rescue DW1 from the attacks by making loud voices of *Yowe* type which scared the association members who had left DW1 to escape to *Machakani* in *kuchechemea* type of running.

However, the evidence of DW1 was protested by Mr. Nchanila contending that: it was afterthought after hearing of the prosecution case; DW1 did not account on time lapse from 11:00 hours when the meeting started to 16:00hours when the offence was committed; failed to call his wife to be witness as she was present at the scene of the crime during the attacks; and he had no any scars to show that he was injured; and escaped Butiama police station for Musoma Police station without good explanations.



With DW2, Mr. Nchanila contended that she did not witness the event of attacks from the accused person to the deceased person.

From the record, it is vivid and plain that there were misunderstandings at the residence of the accused person between the members of the association and the accused person. However, the parties differ on *where* and *how* the attacks from the accused person to the deceased person had occurred. According to the prosecution case, it was outside the house of the accused person and the accused person attacked the deceased person three (3) times at the shoulder by use of a knife. However, the defence complains that PW1 and PW4 are not reliable and credible witnesses to be trusted as they recorded one thing at the police station and produced distinct materials in this court.

The defence on the other hand claims that the attacks occurred inside the house and the deceased was stabbed once by a knife directed at his shoulder. However, at some point both parties agreed that there were ruptures occurred between the accused person and association members. DW2 testified that he found DW1 fighting with the association members and rescued him. Similarly, PW1 and PW2 testified that DW2 found them handling DW1 and attacked PW1 at the back. I am aware that the confusions and

fight may have occurred after the attacks. However, display of the accused person's stuffs outside his residential house, including bed and mattress, invites benefit of doubt on the part of the accused person.

I am also quietly aware that Mr. Nchanila invited the precedent of the Court in **Semburi Mussa v. Republic** (supra). However, in my considered opinion, the precedent cannot be rightly applied in the present case. There are two reasons, first it is difficult to consider the cited seven factors in absence of credible and reliable evidence to establish: the amount of force used; the number of blows inflicted; the kind of injuries; absence utterances before, during and after the attack. Second, even if all factors were established, the mostly cited precedent on the subject of malice aforethought is in the precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, which put in place two (2) reservations at page 5 and 7 of the judgment, namely: (1) each case be considered on its own peculiar facts and (2) if there is doubt of two views on the intention of the accused person, the doubt is to be resolved in favour of the accused persons.

In the present case, there are doubts on whether the accused person had malice aforethought in attacking the deceased person.

In any case, prosecution evidences in PW1 and PW4 have contradictions and inconsistencies in statement recorded at the police station and their testimonies in this court. The practice of this court and the Court discourages the course (see: **Republic v. Joseph Mseti @ Super Dingi & Three Others**, Criminal Sessions Case No. 162 of 2016 and **Onesmo Kashonele & Others v. Republic**, Criminal Appeal No. 225 of 2012).

I am conversant with the decision of the Court in **Dickson Elia Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 on distinction between minor and major discrepancies. However, I think the discrepancies and contradictions brought by PW2 and PW4 in the present case are major and move to the root of the matter. I understand the directives of the Court in the precedent of **Abdallah Rajabu Waziri v. Republic**, Criminal Appeal No. 116 of 2004 on contradictions in police statement and court testimonies. However, I am moved by page 13 and 14 in the judgment of **Onesmo Kashonele & Others v. Republic** (supra) which show that:

*...the contents of PW1's statement (Defence Exh. P.1)  
which he made to the police immediately after the  
robbery, sharply contradicts material oral evidence*

*adduced by PW1 and PW2 in the course of trial...both courts below did not address this vital evidence contained in Defence Exh. P.1 which was admitted in evidence without any objection. Similarly, serious contradictions between the oral evidence and the evidence in Defence Exh. P.1 were not addressed and resolved...we consider the oral evidence given by PW1 and PW2 five months thereafter as having been exaggerated and an afterthought...we can safely deduce that the appellants were implicated in the robbery incident on the basis of grave suspicion*

(Emphasis supplied).

In the present case there are doubts in establishing malice aforethought as from exhibit PE. 1 which is silent on the three (3) attacks and specific measure of depth of the wound, and of course contradiction produced by PW1 and PW4 in cautioned statements and testimonies produced in this court. The identified doubts are resolved in favour of the accused persons (see: **Mohamed Said Matula v. Republic** [1995] TLR 3). In the end I hold that the accused person, Mr. Kiumbe Haruna @ Athumani is found guilty of manslaughter of the deceased persons, Mr. Raphael George @ Ochira.

It is so ordered.

Right of appeal fully explained to the parties.

F.H. Mtulya

**Judge**

20.07.2022

This judgment was pronounced in open court under the seal of this court in the presence of the accused person, Mr. Kiumbe Haruna @ Athumani and his learned counsel Mr. Amos Wilson and in the presence of learned State Attorney, Mr. Roosebert Nimrod Byamungu.

F.H. Mtulya

**Judge**

20.07.2022

### **ANTECEDENTS**

**Byamungu:** My Lord, we have no previous record of the accused person but we pray stiff sentence be imposed to him. My Lord, we have reasons:

1. This accused person curtailed right to life of the deceased person. My Lord, right to life is from God and once given does not repeat;

2. The deceased had 33 years. This means he was young. He was a life to his family and this Nation;

Finally, my Lord, I pray this court to invite the Tanzania Sentencing Manual for Judicial Officers at page 55 where there is high level sentence and for the item in it is for ten (10) years up to life imprisonment.

My Lord, that is all for now and we thank you for giving us opportunity to assist this court in arriving proper sentence. That is all My Lord.

F. H. Mtulya

**Judge**

20.07.2022

### **MITIGATIONS**

**Wilson:** My Lord, I thank you for the invitation. On my side My Lord, I pray this court to consider the following factors:

1. The prosecution said the accused person is the first offender;
2. My Lord, the accused was telling the truth from the begging of this case to date, and you will not find the same in the Sentencing Manual;
3. My Lord, the deceased was young person, but this court may consider the situations of both sides, on the prosecution and defence;

4. My Lord, the accused person stayed in custody for more than two (2) years;

5. My Lord, this accused person said he has wife and family which depends on him. You may consider that My Lord.

That is all from the defence. We thank you for giving us the opportunity to mitigate.

F. H. Mtulya

**Judge**

20.07.2022

**Court:** The accused person, Mr. Kiumbe Haruna @ Athumani was convicted by this court for the offence of manslaughter. Before sentencing him, I invited learned minds Mr. Byamungu and Mr. Wilson. According to Mr. Byamungu, the Sentencing Manual puts the accused person at high level item in sentencing starting from ten (10) years to life imprisonment, whereas Mr. Wilson thinks that the Sentencing Manual is not a cure in every situations and this court may consider the circumstance of this case where from the first day the accused person admitted the offence of manslaughter.

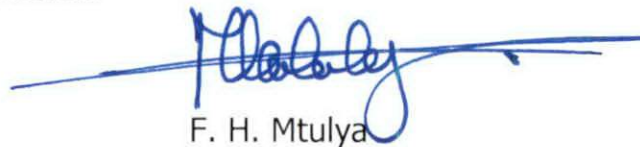
My understanding tells me that the offence of manslaughter was enacted in section 195 of the **Penal Code** [Cap 16 R.E 2019] and its penalty under section 198 of the Code moves up to life imprisonment. However, each case is decided upon its peculiar facts. The Court of Appeal in **Ramadhani Omary v. Republic**,

Criminal Appeal No. 83 of 2018 considered twelve (12) years reasonable and this court in **Valerian Sail v. Republic** [1990] TLR 86 considered nine (9) years reasonable.

However for the sake of certainty of the decisions emanating from this court with similar facts, the **Tanzania Sentencing Manual for Judicial Officers** was introduced in our jurisdiction. I understand the concern of Mr. Amos that the Manual cannot capture every situations. However, the present situation is covered under item I of the Manual in high level sentence ranging from ten (10) years imprisonment to life imprisonment.

In my decision after considering all factors, and noting the accused had already spent two (2) years in prison custody, I have decided to sentence him, Mr. Kiumbe Haruna @ Athumani to eight (8) years imprisonment from the date of this order, today 20<sup>th</sup> July 2022.

It is so ordered.



F. H. Mtulya

**Judge**

20.07.2022





This order was pronounced today, 20<sup>th</sup> July 2022, in open court in presence of the accused person Mr. Kiumbe Haruna @ Athumani and his learned counsel Mr. Amos Wilson and in the presence of learned State Attorney Mr. Roosebert Nimrod Byamungu.



F. H. Mtulya

**Judge**

20.07.2022